

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN R. ATCHLEY, a married man,
Plaintiff,
v.

PEPPERIDGE FARM, INC., a
Connecticut corporation,
Defendant.

No. CV-04-452-FVS

ORDER DENYING MOTION FOR
RECONSIDERATION

MICHAEL GILROY, a married man,
Plaintiff,
v.

PEPPERIDGE FARM, INC., a
Connecticut corporation,
Defendant.

No. CV-04-453-FVS

ORDER DENYING MOTION FOR
RECONSIDERATION

BEFORE THE COURT are Plaintiffs' motions for reconsideration. Plaintiffs John Atchley & Michael Gilroy are represented by John Bury. Defendant Pepperidge Farm, Inc. ("PFI"), is represented by Richard Kuhling, David Broom, Greg Hesler, and Greg Johnson.

BACKGROUND

Plaintiffs each entered into consignment agreements with PFI, granting Plaintiffs the "exclusive right to distribute [PFI] Consigned Products to retail stores" within their respective territories. The consignment agreements also granted Plaintiffs the right to use PFI's trade name, trademark and distinguishing colors on

1 Plaintiffs' vehicles and equipment.

2 In November 2004, Plaintiffs each filed separate actions in
3 Spokane County Superior Court against PFI for rescision of contract
4 and damages for breach of contract, misrepresentation, violation of
5 Washington's Franchise Investment Protection Act ("FIPA"), RCW 19.100
6 et seq, and violation of the Washington Business Opportunity Fraud
7 Act ("BOFA"). PFI removed both actions to federal court and the
8 cases were set on the same briefing schedule, but have not been
9 consolidated. Immediately after the action was removed, Plaintiffs
10 filed separate motions for partial summary judgment and rescission of
11 their contracts with PFI on the basis that PFI violated of the FIPA.
12 The Court denied Plaintiffs' motions on the basis that they had not
13 shown they paid a "franchise fee" when they purchased their
14 distributorships.

15 After additional discovery took place, Plaintiffs renewed their
16 motions for partial summary judgment, arguing new evidence showed
17 Plaintiffs paid numerous indirect or hidden franchise fees. PFI
18 cross-claimed for summary judgment on Plaintiffs' FIPA claim, seeking
19 dismissal of Plaintiffs' remaining causes of action for violation of
20 the BOFA, misrepresentation, and breach of contract. The Court
21 granted PFI's cross-motion for summary judgment dismissal of
22 Plaintiffs' FIPA claim because Plaintiffs failed to establish that
23 they paid a franchise fee. The Court also granted PFI's cross-motion
24 for summary judgment dismissal of Plaintiffs' claim under the BOFA
25 because the Court concluded PFI was not a seller under the BOFA.

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1 **DISCUSSION**

2 Plaintiffs now move for reconsideration of the Court's entry of
3 summary judgment dismissing Plaintiffs' causes of action against PFI
4 under the FIPA and the BOFA.

5 **A. Applicable Standard**

6 A district court may reconsider its order on summary judgment
7 under either Federal Rule of Civil Procedure 59(e) (motion to alter
8 or amend a judgment) or Rule 60(b) (relief from judgment). *School*
9 *Dist. No. 1J, Multnomah County v. AcandS, Inc.*, 5 F.3d 1255, 1262
10 (9th Cir. 1993). Plaintiff relies on Rule 59(e). The standard for
11 governing a reconsideration motion under Rule 59(e) is stringent. "A
12 motion for reconsideration should not be granted, absent highly
13 unusual circumstances, unless the district court is presented with
14 newly discovered evidence, committed clear error, or if there is an
15 intervening change in controlling law. *Sissoko v. Rocha*, 440 F.3d
16 1145, 1153-54 (9th Cir. 2006).

17 **B. Request for Reconsideration**

18 Plaintiffs argue reconsideration is warranted because they have
19 discovered "further evidence and law" since the Court's order on
20 summary judgment. More specifically, Plaintiffs argue they have
21 discovered other fees paid by Plaintiffs that constitute "indirect"
22 or "hidden" franchise fees. To justify reconsideration, Plaintiffs
23 must show the evidence they rely upon was discovered after the
24 Court's order on summary judgment, that the evidence could not have
25 be discovered earlier through due diligence, and that the newly
26 discovered evidence is of such a magnitude that had the Court known

1 of it earlier, the outcome would likely have been different. *Dixon*
2 *v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003). Plaintiffs,
3 however, fail to disclose any "newly discovered evidence" supporting
4 their contention that they paid a franchise fee to PFI. Further,
5 they neglect to explain why the evidence they now rely upon could not
6 have been discovered earlier. Plaintiffs' motions for
7 reconsideration assert the same legal theories raised in opposition
8 to PFI's cross-motion for summary judgment and offer evidence that
9 was clearly within their province at the time of the Court's ruling.
10 Plaintiffs are not entitled to reconsideration based upon this
11 evidence. See e.g., *Frederick S. Wyle, P.C. v. Texaco, Inc.*, 764
12 F.2d 604, 605 (9th Cir. 1985) (holding that motions for
13 reconsideration of summary judgment rulings are not the proper
14 vehicle for offering evidence or theories of law that were available
15 to the party at the time of the initial ruling or could have been
16 discovered prior to the court's ruling). Accordingly,

17 **IT IS HEREBY ORDERED:**

18 1. Plaintiffs' Motion for Reconsideration (Ct. Rec. 158 in CV-
19 04-452-FVS; Ct. Rec. 153 in CV-04-453-FVS) is **DENIED**.

20 2. Defendant's Motion to Strike (Ct. Rec. 164 in CV-04-452-FVS;
21 Ct. Rec. 159 in CV-04-453-FVS) is **MOOT**.

22 **IT IS SO ORDERED.** The District Court Executive is hereby
23 directed to enter this Order and furnish copies to counsel.

24 **DATED** this 7th day of September, 2006.

25 s/ Fred Van Sickle
26 Fred Van Sickle
United States District Judge